

# **MINUTES**

# Freedom of Information, Open Meetings, and Public Records Study Committee

January 10, 2008

#### **MEMBERS PRESENT:**

Senator Michael Connolly, Co-chairperson Senator Daryl Beall Senator Jeff Danielson Senator Pat Ward Representative Vicki Lensing, Co-chairperson Representative Carmine Boal Representative Elesha Gayman Representative Bruce Hunter Representative Libby Jacobs

# MEETING IN BRIEF

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- I. Procedural Business
- II. Open Meetings and Public Records Issues Proposed Draft — Discussion
- III. Discussion of Proposed Draft Professor Bonfield
- IV. Committee Action
- V. Materials Filed With the Legislative Services Agency



#### I. Procedural Business

**Call to Order.** The January 10, 2008, meeting of the Freedom of Information, Open Meetings, and Public Records Study Committee was called to order by Co-chairperson Connolly at 9:03 a.m. The meeting was held in the Supreme Court Chamber of the State Capitol.

Adjournment. The meeting was adjourned at 3:40 p.m.

Committee Business. The Committee approved the minutes of the November 9, 2007, meeting.

**Next Meeting.** The Committee agreed to meet briefly during the legislative session to approve the Final Report of the Committee and proposed draft legislation.

# II. Open Meetings and Public Records Issues — Proposed Draft — Discussion

**Overview.** A bill draft (LSB 5233IC) was prepared and distributed to serve as a basis for comment and discussion at this meeting. Presenters addressed various issues that were included in the bill draft.

# A. Local Government Perspectives

Ms. Mary Gannon, Iowa Association of School Boards; Mr. David Vestal, Iowa State Association of Counties; Mr. Terry Timmons, Iowa League of Cities; and Ms. Shannon Strickler, Iowa Hospital Association; presented a joint document on behalf of their organizations, as well as the Iowa Association of Municipal Utilities and the Iowa Rural Water Association, commenting on several issues relative to the proposed legislation.

#### 1. Administrative Enforcement Scheme

**Ms. Gannon.** The school board association could support establishment of a board, but the details are critical. The Ethics and Campaign Disclosure Board is a good model. The proposed draft does not establish minimum qualifications for membership on the board and expertise is critical. The board should be the sole basis for resolution of open records issues. Government entities should be indemnified if they rely on the advice of the board. The legislation also needs to provide that the board make some initial finding prior to pursuing mediation. The board should also be required to respond to requests for board advice relative to open records issues within 10 days — the same amount of time given government entities to respond to public records requests.

**Mr. Timmons.** The method of prosecuting violations before the board is too complex, confusing, and will result in too much delay. A more streamlined process should be used or the issue should go to court once the board makes an initial finding of a violation. Professor Arthur Bonfield commented that the process used satisfies due process and utilizing the lowa Administrative Procedure Act, Code chapter 17A, is no different than any other administrative enforcement action by state government.

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#### 2. Increasing Civil Penalties

**Mr. Vestal.** The increased civil penalties recommended are excessive and current law should be maintained. If a knowing violation occurs, current penalties are not enough, but for those that are inadvertent, the current penalties should not be increased. Many violations are inadvertent.

**Professor Bonfield.** The defenses to an action seeking civil penalties ensure that inadvertent violations are not punished. In essence, only knowing violations are subject to civil penalties.

#### 3. Repeal of Criminal Sanctions

**Mr. Vestal.** The local government groups agree with eliminating criminal sanctions in Code chapter 22.

#### 4. Time Limits for Responding to Record Requests

**Mr. Vestal.** The local government groups agree with this provision. However, the draft provides that the timelines can be extended if "there is good cause for further delay due to unusual circumstances." The good cause standard should be sufficient and the "unusual circumstances" clause should be deleted. Good cause may exist but it might not be an unusual occurrence, such as the copier needing repair.

**Professor Bonfield.** The suggestion to eliminate the "unusual circumstances" clause is acceptable.

#### 5. Undue Invasion of Personal Privacy

**Mr. Vestal.** The proposed draft is too broad and puts a burden on record custodians to make a judgment as to when the standard may be met. Ideally, the legislation would merely list those records that should not be disclosed so as to avoid invasions of personal privacy.

**Professor Bonfield.** Creating a list would be preferable but there is no way of knowing what new methods of capturing personal information may be utilized in the future. The proposed draft provides standards for determining what information should be protected.

#### 6. Tentative, Preliminary, Draft Material

Mr. Timmons. The local government groups agree with this provision.

#### 7. Government Employee Personnel Records

**Mr. Timmons.** The local government groups agree with this provision.

#### 8. Job Applications for Government Employees

**Ms. Strickler.** The concern is that it makes it more difficult to compete with the private sector for employees. It is also difficult for government employees to apply for another position if that becomes available to their current employer.



#### 9. Final Settlements

**Mr. Timmons.** Current law, as expressed in Code section 22.13, is adequate and no change is necessary. The local government groups do not support requiring the summary of the settlement that is made public to include a statement of facts agreed upon and in dispute. This requirement may hinder settlements.

**Professor Bonfield.** The problem with current Code section 22.13 is that it only applies to a narrow set of settlements. If the public does not know what the dispute is about, how can the public evaluate how the public agency is doing and are they being fair. This is already required by the Iowa Administrative Procedure Act to some extent for state agencies.

## 10. Application of Public Records Laws to Nongovernmental Bodies

**Ms. Gannon.** It is tough, and a practical problem, to make the custodian the public entity if the record is in possession of a nongovernmental body.

**Professor Bonfield.** The legal onus must be placed on the public entity since enforcement against a private entity would be problematic. The proposed draft provides that public records law applies only if there is a contract between the public and private entities and the private entity must be performing a public function.

**Representative Jacobs.** Would this provision allow public access to personnel records of private entities performing government functions? Professor Bonfield indicated that personnel records would not be covered by the proposed draft.

**Senator Danielson.** Salary information relative to employees of a private entity conducting public business should potentially be subject to public disclosure.

#### 11. Identical Exemptions

**Mr. Timmons.** The local government groups agree with this provision.

#### 12. E-mail Meetings

**Mr. Timmons.** It might be easier to change the draft language to indicate affirmatively when an electronic communication is a meeting, not when it is not. Placing substantive provisions in a definition is problematic.

## 13. Walking Quorums

**Mr. Timmons.** While this type of conduct should be prevented, the local government groups have some concerns with how the proposed draft would work. For example, what if one member of a body wants to sell an idea to the rest of the body, when would that become a meeting - should it be a concerted effort by two or more members over a short period of time? In addition, what level of commitment is required to constitute a collective final agreement? Also, who is a personal intermediary and how does a person become this? The proposed draft will deter needed communication between board members.

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**Professor Bonfield.** This is a tough issue to deal with. The desire is to prevent less than quorum discussions that lead to a final decision before the meeting. The proposed draft is not as draconian as other drafts and specific intent still needs to be proven.

**Co-chairperson Connolly.** The local government groups do not want decisions made in private.

## 14. Change in Open Records Definitions

**Mr. Timmons.** While the local government groups cautiously support this, the local government groups have some concern with how the necessary changes in cross-references within Code chapter 22 and the rest of the Code will work. Creating a new category of unqualified confidential records could create a problem for custodians if they release, unintentionally, this information.

**Professor Bonfield.** The draft does not change current law. There already exists some unqualified, confidential records elsewhere in the Code, like income tax returns.

## 15. Other Open Records Issues — Mr. Vestal

The citizens' aide/ombudsman should no longer have a role in open records issues if a new board is established.

If public records are to be used for a commercial purpose, government entities should be allowed to charge for releasing that information.

Code chapter 305, concerning state archives, should be clarified to specifically exclude local government.

The effective date of the proposed draft should be delayed until January 2010.

# B. Iowa Hospital Association — Ms. Strickler

- **1.** The exemption for competitive information in Code section 388.9, now applicable to municipal hospitals, should be extended to county hospitals.
- 2. Public hospital boards should be allowed to discuss quality process improvements in closed session.
- **3.** Public hospitals receive little tax support, so open records and meetings requirements should reflect this.

# C. Iowa Freedom of Information Council/Iowa Newspaper Association — Ms. Kathleen Richardson, Executive Secretary, Iowa Freedom of Information Council

1. The council supports much of the proposed draft, especially as it relates to establishing an independent agency to enforce the law, and addressing personnel records,



publication of finalists, disclosing relevant facts of settlement agreements, and clarifying time frames for replying to requests.

2. The council does not support the change in definitions, the undue invasion of privacy exception, and the tentative draft material exception. Costless enforcement will not lead to lots of requests.

# D. Citizens' Aide/Ombudsman — Mr. William Angrick

- 1. The new board and administrative agency needs to be flexible and adequately resourced. The agency will likely need more than \$250,000 but less than \$1 million. The current ethics board is also underresourced.
- 2. The board should be given the authority to void actions and remove violators.
- **3.** Government officials, and their attorneys, need mandatory training on open records and open meetings issues.
- **4.** The undue invasion of personal privacy exception is overly broad.
- **5.** The exception for tentative material needs to be carefully crafted.
- **6.** The numerical ceiling for finalists in the proposed draft should be eliminated.
- 7. More guidance regarding retention of records should be considered.
- **8.** Disclosure of information regarding law enforcement agencies needs to be clarified.
- **9.** The citizens' aide/ombudsman should still have a role in these issues even with establishment of the new board.

#### E. Iowa Judicial Branch — Ms. Rebecca Colton

The draft proposal relative to the authority granted the court to establish disclosure rules may be too limited. The court would prefer broader authority.

### F. State Archivist — Mr. Gordon Hendrickson

- 1. Code chapter 305 only applies to state records so do not need specific exclusion for local governments.
- 2. The archivist would prefer legislation to clarify, for retention purposes, the distinction between record and nonrecord material and how they are preserved and disposed of.
- **3.** Documents "acquired or received only for convenience or reference purposes" should be treated as nonrecord material.

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- **4.** If documents are destroyed based on retention schedules, then there should be no requirement to disclose under Code chapter 22.
- **5.** A time limit should be placed on how long a confidential record maintains its status as a confidential record. Twenty years could be used, but not sure what length of time would be appropriate. Professor Bonfield indicated that the archivist could be given rulemaking authority to set the length of time for certain classes of material.

# G. American Civil Liberties Union — Mr. Marty Ryan

- 1. With election of remedies, the court should be given the option to dismiss with prejudice.
- **2.** A \$10 fee could be charged for persons submitting a complaint to the new board.
- **3.** Concern that the board performs all functions relative to a complaint, fact-finding, conducting a hearing, and issuing an order. Professor Bonfield indicated that Code chapter 17A provides that the same person cannot perform these different functions.
- **4.** The tentative and draft materials exception is too restrictive.
- **5.** Complaints relative to a public official should not be shielded by placement in personnel records.

# III. Discussion of Proposed Draft — Professor Bonfield

Professor Bonfield reviewed the proposed draft of legislation.

#### A. Civil Penalties Increase

The penalties only apply to intentional violations.

# B. Definitions Change

The proposed draft does not change the law, just the labeling. The proposal makes clear that all government records are considered public unless exempted.

# C. Application of Public Records Laws to Nongovernmental Bodies

- 1. **Professor Bonfield.** The proposal provides that if a public entity contracts with a private entity to perform a government function, records relating to that government function are disclosable.
- 2. Representative Hunter. The public needs to know what private entities are doing with public money. Some disclosure of salary information for these private entities should be required.



- **3. Senator Beall.** Some distinction could be made relative to private entities that exist solely based upon public money and those that do not. More disclosure from those that solely exist due to public money could be required.
- 4. Senator Danielson. Salary information is important to know in order to compare the private and the public sector when they perform government functions. The public does not need to know overall compensation of a private entity employee with multiple public and nonpublic responsibilities, but the public should know compensation related to the performance of public functions.
- **5. Legislative Services Agency.** One possibility would be to require disclosure of salary information in addition to the other requirements of Code chapter 8F relative to government service contracts.

### D. Time Limits

Agree with the suggestion to eliminate the "unusual circumstances" phrase and replace with "good cause for delay."

## E. Personnel Records Provision — Legislative Services Agency.

The term "compensation" in the draft could reference the definition of "compensation" in Code section 8F.2.

# F. Access to Library Records by Parents

**Co-chairperson Lensing.** The draft proposal should make it clear that it is the child's parent or guardian that has access to these records.

# G. Invasion of Personal Privacy Exception

- 1. Professor Bonfield. Relying solely on a list of "private" records is problematic impossible to cover everything. The proposed draft gives guidance to record custodians on the basis for making a determination if a record release would constitute an undue invasion of personal privacy. The new board can also provide guidance on this.
- 2. Representative Hunter. The language is fine and board enforcement can help.
- **3. Co-chairperson Connolly.** A list would be preferable but the proposal as drafted will not be changed.
- **4. Senator Danielson.** The proposal from the ombudsman relative to personal information protection should be considered.

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# H. Tentative Draft Material Exception

**Professor Bonfield.** The draft proposal is balanced. States with strong, costless enforcement have this exception. In fact, the deliberative privilege exemption in New Jersey and Connecticut, states with strong enforcement, is much broader than the draft proposal. The strong board created in the draft proposal can curb agencies that try to take advantage of this exception to disclosure. The draft should be modified to make clear that a draft not subject to disclosure is created prior to its final completion and in a form prior to the form for which it is submitted for use.

#### I. Board Powers and Duties

- 1. Professor Bonfield. The draft provides that the board has authority to hire employees, adopt rules, receive complaints, mediate disputes, investigate, prosecute, issue subpoenas, render decisions, impose civil penalties, and represent itself in court to enforce its decisions and rules. In Connecticut, the attorney general was initially given the sole authority to prosecute and defend cases of the board, but eventually legislation was enacted giving the board the authority to utilize and hire its own attorneys.
- **2. Co-chairperson Connolly.** The Attorney General has expressed concern regarding the authority granted the board to hire its own attorneys.

#### J. Enforcement and Remedies Provision

- 1. Professor Bonfield. The board is able to impose penalties in the same manner if an action was filed in court, except that the board cannot remove a person from office. If that remedy is sought, action must be taken in court. An administrative agency should not be given the power to remove someone from office.
- **2. Representatives Boal and Jacobs.** Expressed some concern with granting the board the authority to seek removal of a person from office in court.
- 3. Committee Action. The Committee agreed to allow the board to file an action under Code chapter 21 or 22 to remove a person from office for a violation that would subject a person for removal under Code chapter 21 or 22.

# K. Board Expertise

**Representative Hunter.** Should the qualifications for members of the board be specified in statute? Expertise will be critical in performing the functions of this board.

**Representative Jacobs.** The local government groups may need to look at requiring some expertise in appointment of members to the board.



#### IV. Committee Action

## A. Draft Proposal

The Committee agreed to finalize the draft proposal and meet again to adopt a final report with a proposed draft.

# B. Code Chapter 305 — State Archives

The Committee recommended that a separate bill addressing issues relative to Code chapter 305 should be drafted. The state archivist and Professor Bonfield should consult as to proposed legislation relative to these issues.

# V. Materials Filed With the Legislative Services Agency

The following materials listed were distributed at or in connection with the meeting and are filed with the Legislative Services Agency. The materials may be accessed from the <Additional Information> link on the Committee's Internet web page:

http://www.legis.state.ia.us/aspx/Committees/Committee.aspx?id=216.

- 1. Proposed Bill Draft Language Public Records/Open Meetings (LSA).
- 2. Comments Proposed Draft Language (ISAC, ILC, IASB, IHA).
- **3.** Mr. Hendrickson, State Archivist, Comments on Draft Language.
- 4. Ms. Richardson, IFOIC, Comments on Draft Language (December 12, 2007).
- **5.** Mr. Ryan, ACLU, Comments on Draft Language.
- **6.** Ms. Colton, Iowa Judicial Branch, Proposed Legislation.
- 7. Ms. Strickler, IHA Comments.
- **8.** Mr. Angrick, Citizens' Aide/Ombudsman, Statement re: Draft Language.
- **9.** Mr. Angrick, Comments on Draft Language (December 7, 2007).
- 10. Mr. Angrick, Review of section 22.7 Exemptions.

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